# (19,137.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

## No. 486.

THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1903.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester, plaintiff and The Worcester Consolidated Street Railway Company, defendant, in a petition for a writ of mandamus wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said City of Worcester as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twenty-eighth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the thirty-first day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
*Clerk of the Circuit Court of the United States, District of Massachusetts.*

Allowed by—
MARCUS P. KNOWLTON.
*C. J. S. J. C.*

1—486

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

And now, here, the judges of the supreme judicial court make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said supreme judicial court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[SEAL.] T. S. JOHNSON, *Clerk.*

3 *Bond.*

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sittting of the supreme judicial court of Massachusetts, holden at Worcester within and for the county of Worcester, in a suit depending in said court, between The City
4 of Worcester, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in a petition for a writ of mandamus a judgment and final order was rendered against the said plaintiff dismissing its said petition and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then

the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
THE AMERICAN BONDING CO.,
By JOHN R. THAYER, *Vice Pres't.*

Attest:
[L. S.] ANDREW B. McGOWN, *Ass't Sec'y.*

Approved:
MARCUS P. KNOWLTON,
*C. J. S. J. C.*

Bond approved
FRANCIS H. DEWEY,
*Att'y for Wor. Con. St. R'lway Co.*

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Marcus P. Knowlton, chief justice, and filed November 7, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] #816. (Pet. for mandamus.) City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } *ss:*
*Worcester,* }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, begun and holden at Worcester, within and for our said county of Worcester, on the second Tuesday of April, being the eighth day of said month, in the year of our Lord one thousand nine hundred and two, it is thus contained:—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within Said County and Commonwealth, Petitioner,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

*Petition for a Writ of Mandamus.*

To the honorable the justices of the supreme judicial court:

Respectfully represents the City of Worcester,—

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Trumbull, Green, Millbury and Greenwood streets in said Worcester; that due notice was given of said petition and hearing given thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests, and a copy of which location, with the said terms and conditions, is hereto annexed and marked "A."

9 Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company con-

structed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the pavement upon Millbury street and particularly upon that portion thereof lying between Vernon square and the bridge over the Blackstone river at Quinsigamond, except that part lying between the westerly or southerly rail and the westerly or southerly curb between Cambridge street and said bridge, all of which portion was paved originally by said respondent company and was required to be so paved by the conditions of said location, has become worn out, uneven, rough, unfit for further use and dangerous to travel, and said respondent company has failed to maintain said pavements and to keep said pavements in repair to the satisfaction of the proper city officers of the city of Worcester; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance and keeping in proper repair of pavements upon said Millbury street, but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance and keeping in proper repair of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain and keep in proper repair said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain and keep in proper repair said pavements.

Wherefore your petitioner prays that a writ of mandamus may issue to compel the said Worcester Consolidated Street Railway Company to perform its public duty in the premises and to compel said respondent company to maintain and keep in proper repair said pavement upon said portions of said Millbury street and for such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
*Street Commissioner.*

WORCESTER, *ss:*

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me—

ERNEST I. MORGAN,
*Justice of the Peace.*

12 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track on Trumbull street, Green and Millbury street and Greenwood street to Millbury line. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore; it is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester, as follows to wit: Beginning at a point in Trumbull street at its intersection with the northerly line of Park street; thence crossing Trumbull square and continuing southerly along Green street to Millbury street; thence southerly along Millbury street to the terminus of the present track at Greenwood street, and the
13 same is hereby accordingly located upon the following conditions.

First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving over and upon said location and streets, as follows: In Green street from the Boston and Albany railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to the bridge at Quinsigamond, crossing the Blackstone river between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said company shall
14 have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said

company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be *required* by said committee and the expense of such repairs shall be paid by the said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of said streets, and at such points in the location of said tracks where the surface water is impeded or obstructed, such means for its disposal shall be provided as shall meet the approval of said committee.

15 Fourth. All necessary strengthening of road bridges shall be made by said company, and the expense thereof shall be borne by it, and whatever strengthening of bridges is necessary shall be determined by the joint standing committee on highways and sidewalks.

Fifth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks and that the position of all turnouts, cross-overs and spur tracks shall be located by said committee.

Sixth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks, and shall be located at such points along the line of said location as the said committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire, shall be attached to said poles at such height as to maintain said trolley-wire at every point not less than eighteen feet above the surface of the street.

16 Seventh. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition and to the satisfaction of said committee and whenever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting said wires to be done to the acceptance of said committee and under the direction of the superintendent of fire alarm telegraph.

Eighth. At all such points where the stringing of feed trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets and all expense incurred in the changing of said bridges brackets or other appliances shall be paid for by said railway company.

Ninth. That in the care and maintenance of said railway the removal of snow and other obstructions from said location shall be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

17 Tenth. That the acceptance of this decree shall be made within thirty days from the date of said decree and the construction of said tracks shall be commenced within three months from the date of said acceptance and be completed and in operation within eighteen months thereafter.

Eleventh. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Accepted, Worcester, May 9th, 1893.

Filed Feb. 18, 1901.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and the same was presented to one of the justices thereof on the twentieth day of said February, who ordered endorsed thereon the following: Ordered that notice issue returnable first Tuesday March, at Boston.

Attest: JOHN NOBLE, *Clerk.*

And thereupon an order of notice was issued as follows, to wit:

18 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } ss:

Supreme Judicial Court.

FEBRUARY 20TH, A. D. 1901.

On the petition aforesaid, it is ordered, that the petitioner notify the said The Worcester Consolidated Street Railway Company to appear at this court, at Boston, in our county of Suffolk, on the first Tuesday of March next, by serving it with an attested copy of said petition and this order forthwith, that it may, then and there, shew cause why the prayer of said petition should not be granted.

Attest: T. S. JOHNSON, *Clerk.*

And return of service was afterwards made by the officer who served the same in the words and figures following, to wit:

19 WORCESTER, ss:

WORCESTER, *February* 27, *A. D.* 1901.

By virtue hereof I this day at 4:55 o'clock p. m. made service of the within petition and order of court thereon, by giving in hand a true and attested copy thereof to A. H. Stone, treasurer of the within named Worcester Consolidated Street Railway Company.

JAS. M. DRENNAN,
*Deputy Sheriff.*

| | |
|---|---|
| Service | .50 |
| Travel | .08 |
| Copy | 2.00 |
| | 2.58 |

20 And on the third day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,* }

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

*Respondent's Demurrer to Petition for a Writ of Mandamus.*

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the petitioner to maintain its petition, and assigns the following causes for its demurrer.

21 1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said petitioner.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this respondent, and that this respondent does not owe any duty and is under no obligations imposed by law to the petitioner.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this respondent in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
22 impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should maintain block paving or any other form of

paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the respondent's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the respondent's tracks and eighteen inches on each side of the portion occupied by the respondent's tracks.

6. For that by the general laws now in force this respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

23 7. For that it is the duty of the city of Worcester and the proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this respondent derived its charter and all its corporate powers has by statute relieved this respondent of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost *of* to said city of the work done by it, which was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it no where appears in said petition that this re-
24 spondent has not duly and punctually paid said excise tax in the manner provided by law.

10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said petitioner the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the petitioner, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WARREN & GARFIELD,
*Att'ys for Respondent.*

I hereby certify that I am of the opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry and that the same is not intended merely for delay.

BENTLEY W. WARREN,
*One of the Attorneys for Respondent.*

Filed April 3d, 1901

25 And on said third day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

*Answer of Respondent to the Petition for a Writ of Mandamus.*

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceeding and for answer to the petition of the City of Worcester admits the allegations contained in the first, second, third, fourth and fifth paragraphs
26 of the petition, but denies each and all of the allegations in the sixth paragraph of said petition contained.

And further answering this respondent says that the petitioner is not entitled to the issuance of a writ of mandamus out of this court because the petition is not properly signed by or on behalf of the City of Worcester and because the same should not be brought by said city, because said city has no jurisdiction over this respondent, and because by the provisions of chapter 578 of the Acts of 1898 and other laws of said Commonwealth now in force this respondent is not required to keep any portion of the surface materials of streets, roads and bridges in repair, and because the condition in the grant of the extension of location, a copy of which is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location, and because the condition that this respondent should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets, those
27 portions of the streets occupied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose and was invalid and void and not binding upon this respondent; and because by the provisions of said chapter 578 of the Acts of the Year 1898 this respondent was relieved from the duty of keeping in repair any portion of streets, roads and bridges and was required instead of performing that duty to pay an excise tax to the various cities and towns in which it operated its railway, and that it has duly and punctually paid to the city of Worcester the amount of all taxes assessed upon it under the pro-

visions of said act, and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax and this respondent says that said city has never taken proceedings to have the amount of said tax increased
28 according to law; and this respondent says that it is the duty of said city to keep in repair at the expense of said city the highways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

And further answering this respondent denies that it has failed to maintain and keep in repair any pavements which it is required by law to maintain and keep in repair, and denies that any portions of the streets named in said location have become unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.
P.

Filed April 3d, 1901.

29 Thereupon, on the twenty-ninth day of said April the parties appeared and a hearing was had upon the petition and demurrer, and the case was reserved upon the same by the presiding justice for the consideration of the full court, said reservation being in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Supreme Judicial Court.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RLWY. Co. } Nos. 816 & 817.

*Reservation.*

These cases were heard by me on the petitions for mandamus and demurrers. The parties agreed that the locations set out in said petitions were granted under the provisions of section 21 of chapter 113 of the Public Statutes, that no question of the form of procedure or of the proper parties should be insisted upon, but both desired to obtain the decision of the court on the substantive question, whether or not under the law applicable to the cases at the time when
30 these petitions were filed the stipulations or conditions requiring the respondent to pave and perform other active duties as set forth in the grants of locations are binding upon the respondent. If the court answers this question in the affirmative,

the writs are to issue; if otherwise, the petitions are to be dismissed.

OLIVER WENDELL HOLMES, *C. J.*

Filed April 29th, 1901.

31 And thence the case was continued, and afterwards, to wit: on the fourteenth day of July, A. D. 1902, the parties appeared and it was ordered by said supreme judicial court by its rescript as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the supreme judicial court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Demurrer sustained and petition dismissed with costs.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

32 Whereupon the following order for dismissal was issued by our said court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Supreme Judicial Court.

CITY OF WORCESTER, Petitioner,
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, Respondent.

*Final Decree.*

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript of the supreme judicial

court, it is ordered that this petition be dismissed and that the defendant's costs be taxed by the clerk and paid by the petitioner.

By the court,

T. S. JOHNSON, *Clerk.*

April 8th, 1903.

33 All and singular which the premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Marcus P. Knowlton, chief justice of our said supreme judicial court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

[SEAL.] T. S. JOHNSON, *Clerk.*

34 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

*Petition for Writ of Error and Assignment of Errors.*

The City of Worcester, plaintiff in the above-entitled action, represents that errors of law appear in the record of this case:

That on the 10th day of April, 1893, the board of aldermen of the city of Worcester acting under section 21 of chapter 113 of the Public Statutes, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester, as follows:—

Beginning at a point in Trumbull street at its intersection with the northerly line of Park street; thence crossing Trumbull square and continuing southerly along Green street to Millbury street; thence southerly along Millbury street to the terminus of the present track of Greenwood street;

and that said location and extension was granted under restrictions and conditions set out at length in the record in said cause.

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiff's contention and adversely to the existence of the Federal rights claimed.

Wherefore, it respectfully petitions for a writ of error to the Supreme judicial court of the Commonwealth of Massachusetts,

holden at Worcester within and for the county of Worcester
35 and files herewith its assignment of errors as follows, to wit:

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof, to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof, to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obli-
36 gation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the city of Worcester of its property and property rights without due process of law.

THE CITY OF WORCESTER,
By ARTHUR P. RUGG,
*City Solicitor and Attorney for Plaintiff.*

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error. Assignment of errors. Filed Sept. 30th, 1903. Attest, T. S. Johnson, clerk.

37 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
*vs.*
SAME.

In Supreme Judicial Court. Petitions Writs of Mandamus.

SAME
*vs.*
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
*vs.*
SAME.

SAME
*vs.*
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

38 BARKER, *J.:*

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are

here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
39 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
40 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
41 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a

limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among
which had been that of paving and keeping in repair more
42 of the street than was required by the general law, and also
that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in
the city or town as to whose streets, roads or bridges there
43 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the deter-

mination of these cases, and we express no opinion upon the question.

The result is that in the action at law, the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petition dismissed.

*So ordered.*

43½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

44 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * twenty-eighth day of November next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of the Commonwealth of Massachusetts in the county of Worcester, wherein The City of Worcester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, chief justice of the supreme judicial court of Massachusetts, this thirty-first day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] MARCUS P. KNOWLTON,
*C. J. S. J. C.*

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* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,
*Attorney for the Worcester Consolidated Street Railway Co.*

45 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Supreme Judicial Court.

I, Theodore S. Johnson, clerk of the supreme judicial court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record in the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company on a petition for a writ of mandamus in said supreme judicial court, determined and annexed to and transmitted with said record, of

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and the acceptance of service thereon.

In witness whereof I have hereto set my hand and the [SEAL.] seal of said court, this twelfth day of November, in the year of our Lord one thousand nine hundred and three.

T. S. JOHNSON, *Clerk.*

[Endorsed:] #816 City of Worcester (pet. for mandamus) *vs.* Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19137. Massachusetts supreme judicial court. Term No. 486. The City of Worcester, plaintiff in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23d, 1903. File No. 19137.

(19,138.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 487.

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THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

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IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1903.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester, plaintiff and The Worcester Consolidated Street Railway Company, defendant, in a petition for a writ of mandamus wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said City of Worcester as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twenty-eighth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the thirty-first day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts,*
By BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by—
MARCUS P. KNOWLTON,
*C. J. S. J. C.*

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,*

And now, here, the judges of the supreme judicial court make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said supreme judicial court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[SEAL.] THEODORE S. JOHNSON, *Clerk.*

3 *Bond.*

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the supreme judicial court of Massachusetts holden at Worcester within and for the county
4 of Worcester, in a suit depending in said court, between The City of Worcester, plaintiffs, and The Worcester Consolidated

Street Railway Company, defendant, in a petition for a writ of mandamus a judgment and final order was rendered against the said plaintiff dismissing its said petition and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
5 THE AMERICAN BONDING CO.,
[L. S.] By JOHN R. THAYER, *Vice Pres't.*
Attest:
ANDREW B. McGOWN, *Ass't Sec'y.*

Approved:
MARCUS P. KNOWLTON,
*C. J. S. J. C.*

Bond approved.
FRANCIS H. DEWEY,
*Att'y for Wor. Con. St. R'lway Co.*

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Marcus P. Knowlton, chief justice, and filed November 7, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] #817. (Pet. for mandamus.) City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,* }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, begun and holden at Worcester, within and for our said county of Worcester, on the second Tuesday of April, being the eighth day of

said month, in the year of our Lord one thousand nine hundred and two, it is thus contained :—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent.

*Petition for a Writ of Mandamus.*

To the honorable the justices of the supreme judicial court:

Respectfully represents the City of Worcester,—

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Pleasant streeet westerly in and from Park avenue to June street in said Worcester; that due notice was given of said petition and hearing given thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests, and a copy of which location, with the said terms and conditions,

9 is hereto annexed and marked "A."

Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing

by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company constructed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars, and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the block paving between the rails of each track, in the whole space between the tracks and for the space of eighteen inches outside the tracks, has become worn out, uneven, rough, unfit for further use and dangerous for travel; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance of pavements upon said Pleasant street, but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain said pavements.

Wherefore your petitioner prays that a writ of mandamus may issue to compel the said Worcester Consolidated Street Railway Company to perform its public duty in the premises and to compel said respondent company to maintain said pavement upon said portions of said Pleasant street and for such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
*Street Commissioner.*

WORCESTER, ss:

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me—

ERNEST I. MORGAN,
*Justice of the Peace.*

12 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track from its present tracks in Park avenue at its junction with Pleasant street through Pleasant street to June street. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore; it is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester as follows, to wit:

Beginning at a point on the easterly line of Park avenue at its intersection with Pleasant street, thence westerly crossing said Park avenue and continuing westerly and northerly along said Pleasant street to the southerly line of June street, and the same is
13 hereby accordingly located upon the following conditions:

First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving between the rails of each track, the whole space between the tracks and for the space of eighteen inches outside of the tracks. Said paving blocks shall be of full size and their quality and manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks. And for the remaining width of said Pleasant street, for the entire length of said location the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of
14 said streets, and at such points in the location of said tracks where surface water is impeded or obstructed, such means for its disposal shall be provided as shall meet the approval of said committee.

Fourth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks, and that the position of all turnouts, crossovers and spur tracks shall be located by said committee.

Fifth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks and shall be located at such points along the line of said location as the committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire shall be attached to said poles at such a height as to maintain said trolley-wire at every point not less than eighteen feet above the surface of the street.

Sixth. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition, and to the satisfaction of said committee and wherever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting of said wires to be done to the acceptance of said committee, and under the direction of the superintendent of fire alarm telegraph.

Seventh. At all such points where the stringing of feed, trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets, and all expense incurred in the changing of said bridges, brackets, or other appliances shall be paid for by said railway company.

Eighth. That in the care and maintenance of said railway the removal of snow and other obstructions from said locations shall be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

Ninth. That the acceptance of this decree shall be made within thirty days from the date of said decree and the construction of said tracks shall be commenced within three months from the date of said acceptance, and be completed and in operation within eighteen months thereafter.

Tenth. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Worcester, May 9th, 1893.

Accepted.

Filed Feb. 18, 1901.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and the same was presented to one of the justices thereof on the twentieth day of said February, who ordered endorsed thereon the following:—Ordered that notice issue returnable first Tuesday March, at Boston.

Per order Lathrop J.

Attest: JOHN NOBLE, *Clerk.*

And thereupon an order of notice was issued as follows, to wit:—

17 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

FEBRUARY 20TH, A. D. 1901.

On the petition aforesaid, it is ordered, that the petitioner notify the said The Worcester Consolidated Street Railway Company to appear at this court, at Boston, in our county of Suffolk, on the first Tuesday of March next, by serving it with an attested copy of said petition and this order forthwith, that it may, then and there, shew cause why the prayer of said petition should not be granted.

Attest: T. S. JOHNSON, *Clerk.*

And return of service was afterwards made by the officer who served the same in the words and figures following, to wit:

WORCESTER, *ss:*

WORCESTER, *February 27th, A. D.* 1901.

By virtue hereof I this day at 4:55 o'clock p. m. made service of the within petition and order of court thereon, by giving in hand a true and attested copy thereof to A. H. Stone, treasurer of the within named Worcester Consolidated Street Railway Company.

| | |
|---|---|
| Service | .50 |
| Travel | .08 |
| Copy | 2.00 |
| | 2.58 |

JAS. M. DRENNAN,
*Deputy Sheriff.*

18 And on the third day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth, Respondent. } No. 817.

*Respondent's Demurrer to Petition for a Writ of Mandamus.*

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the petitioner to maintain its petition, and assigns the following causes for its demurrer.

19 1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said petitioner.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this respondent, and that this respondent does not owe any duty and is under no obligations imposed by law to the petitioner.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this respondent in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
20 impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the respondent's tracks the condition that the respondent should maintain block paving or any other form of paving or surface material in any portions of such of said streets as

were paved, excepting the portions of said streets occupied by the respondent's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the respondent's tracks and eighteen inches on each side of the portion occupied by the respondent's tracks.

6. For that by the general laws now in force this respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

7. For that it is the duty of the city of Worcester and the
21 proper officers of said city to keep in repair, at the expense, of said city, highways, townways, streets, causeways and bridges so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this respondent derived its charter and all its corporate powers has by statute relieved this respondent of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost of to said city of the work done by it, which — was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it no where appears in said petition that this respondent has not duly and punctually paid said excise tax in the manner provided by law.

22 10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said petitioner the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the petitioner, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WARREN & GARFIELD,
*Att'ys for Respondent.*

I hereby certify that I am of the opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry and that the same is not intended merely for delay.

BENTLEY W. WARREN,
*One of Attorneys for Respondent.*

Filed April 3d, 1901.

23 And on said third day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Supreme Judicial Court.

THE CITY OF WORCESTER, a Municipal Corporation within said County and Commonwealth, Petitioner,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Corporation Having a Usual Place of Business at Worcester, in said County and Commonwealth,. Respondent. } No. 817.

*Answer of Respondent to the Petition for a Writ of Mandamus.*

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceeding and for answer to the petition of the City of Worcester admits the allegations contained in the first, second, third, fourth and fifth paragraphs of the petition, but denies each and all of the allegations in the
24 sixth paragraph of said petition contained.

And further answering this respondent says that the petitioner is not entitled to the issuance of a writ of mandamus out of this court because the petition is not properly signed by or on behalf of the City of Worcester and because the same should not be brought by said city, because said city has no jurisdiction over this respondent, and because by the provisions of chapter 578 of the Acts of 1898 and other laws of said Commonwealth now in force this respondent is not required to keep any portion of the surface materials of streets, roads and bridges in repair, and because the condition in the grant of the extension of location, a copy of which is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location, and because the condition that this respondent should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets, those
25 portions of the streets occupied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose and was invalid and void and not binding upon this respondent; and because by the provisions of said chapter 578 of the Acts of the Year 1898 this respondent was relieved from the duty of keeping in repair any portion of streets, roads and bridges and was required instead of performing that duty to pay an excise tax to the various cities and towns in which it operated its

railway, and that it has duly and punctually paid to the city of Worcester the amount of all taxes assessed upon it under the provisions of said act, and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax and this respondent says that said city has never taken proceedings to have the amount of said tax increased according to law; and this respondent says that it is the duty of said city to keep in repair at the expense of said city the high-
26 ways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

And further answering this respondent denies that it has failed to maintain and keep in repair any pavements which it is required by law to maintain and keep in repair, and denies that any portions of the streets named in said location have become unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.

Filed April 3d, 1901.

27 Thereupon, on the twenty-ninth day of said April the parties appeared and a hearing was had upon the petition and demurrer, and the case was reserved upon the same by the presiding justice for the consideration of the full court, said reservation being in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RLWY. CO. } Nos. 816 & 817.

*Reservation.*

These cases were heard by me on the petitions for mandamus and demurrers. The parties agreed that the locations set out in said petitions were granted under the provisions of section 21 of chapter 113 of the Public Statutes, that no question of the form of procedure or of the proper parties should be insisted upon, but both desired to obtain the decision of the court on the substantive question, whether or not under the law applicable to the cases at the time when
28 these petitions were filed the stipulations or conditions requiring the respondent to pave and perform other active

duties as set forth in the grants of locations are binding upon the respondent. If the court answers this question in the affirmative, the writs are to issue; if otherwise, the petitions are to be dismissed.

OLIVER WENDELL HOLMES, *C. J.*

Filed April 29th, 1901.

29 And thence the case was continued, and afterwards, to wit: on the fourteenth day of July, A. D. 1902, the parties appeared and it was ordered by said supreme judicial court by its rescript as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the supreme judicial court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Demurrer sustained and petition dismissed with costs.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

30 Whereupon the following order for dismissal was issued by our said court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Supreme Judicial Court.

CITY OF WORCESTER, Petitioner,
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, Respondent.

*Final Order.*

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript of the supreme judicial

court, it is ordered that this petition be dismissed and that the defendant's costs be taxed by the clerk and paid by the petitioner.

By the court,

T. S. JOHNSON, *Clerk.*

April 8th, 1903.

31 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Marcus P. Knowlton, chief justice of our said supreme judicial court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

[SEAL.] T. S. JOHNSON, *Clerk.*

32 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

*Petition for Writ of Error and Assignment of Errors.*

The City of Worcester, plaintiff in the above-entitled action, represents that errors of law appear in the record of this case:

That on the 10th day of April, 1893, the board of aldermen of the city of Worcester acting under section 21 of chapter 113 of the Public Statutes, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester, as follows:—

Beginning at a point on the easterly line of Park avenue at its intersection with Pleasant street, thence westerly crossing said Park avenue and continuing westerly and northerly along said Pleasant street to the southerly line of June street,

and that said location and extension was granted under restrictions and conditions set out at length in the record in said cause.

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiff's contention and adversely to the existence of the Federal rights claimed.

Wherefore, it respectfully petitions for a writ of error to the supreme judicial court of the Commonwealth of Massachusetts,

holden at Worcester within and for the county of Worcester, and files herewith its assignment of errors as follows, to wit:

33 1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof, to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obli-

34 gation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the city of Worcester of its property and property rights without due process of law.

THE CITY OF WORCESTER,
By ARTHUR P. RUGG,
*City Solicitor and Attorney for Plaintiff.*

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

35 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
*vs.*
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
*vs.*
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
*vs.*
SAME.

SAME
*vs.*
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

36 BARKER, *J.:*

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are

here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
37 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
38 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
39 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the

other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more
40 of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there
41 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force

when the grants of locations were made is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law, the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

*So ordered.*

41½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

42 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * twenty-eighth day of November next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of the Commonwealth of Massachusetts in the county of Worcester, wherein The City of Worcester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, chief justice of the supreme judicial court of Massachusetts, this thirty-first day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] MARCUS P. KNOWLTON,
*C. J. S. J. C.*

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* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

UNITED STATES OF AMERICA,
*District of Massachusetts, Worcester County,* } *ss:*

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.
F. H. DEWEY,
*Attorney for the Worcester Consolidated Street Railway Co.*

43 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Supreme Judicial Court.

I, Theodore S. Johnson, clerk of the supreme judicial court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record in the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, on a petition for a writ of mandamus in said supreme judicial court, determined and annexed to and transmitted with said record, of

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and the acceptance of service thereon.

In witness whereof I have hereto set my hand and the [SEAL.] seal of said court, this twelfth day of November, in the year of our Lord one thousand nine hundred and three.

T. S. JOHNSON, *Clerk.*

[Endorsed:] #817 (Pet. for mandamus.) City of Worcester *vs.* Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,138. Massachusetts supreme judicial court. Term No. 487. The City of Worcester, plaintiff in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23d, 1903. File No. 19,138.

(19,139.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 488.

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THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

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IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester and The Board of Aldermen of the City of Worcester plaintiffs and The Worcester Consolidated Street Railway Company defendant, in a bill in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said City of Worcester and Board of Aldermen of the City of Worcester as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the sixteenth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts,*

Allowed by—
ALBERT MASON.
*Chief Justice Superior Court.*

2 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,* }

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said superior court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

3 *Bond,* 1437.

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court of Massachusetts holden at Worcester within and for the county of Worcester, in
4 a suit depending in said court, between The City of Worcester and others, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in a bill in equity a judgment and final order was rendered against the said plaintiff- dismissing *its* said bill and the said plaintiff- having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester and others shall prosecute their writ of error to effect,

and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
THE AMERICAN BONDING CO.,
5 [L. S.] By JOHN R. THAYER, *Vice Pres't.*

Attest: HENRY A. MACGOWAN, *Ass't Sec'y.*

Approved:
ALBERT MASON, *C. J. S. C.*

Bond approved.
FRANCIS H. DEWEY,
*Att'y for Wor. Con. St. R'lway Co.*

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Albert Mason, chief justice, and filed November 7th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] #1437. City of Worcester *vs.* Worcester Consolidated Street Railway Company. (Equity) Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } *ss:*
*Worcester,* }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court begun and holden at Fitchburg within and for our said county of Worcester, on the first Monday of June, being the second day of said month, in the year of our Lord one thousand nine hundred and two, it is thus contained:—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

In Equity.

To the honorable justices of the superior court:

Respectfully represents the said City of Worcester.

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Trumbull, Green, Millbury and Greenwood streets in said Worcester; that due notice was given of said petition and hearing given thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests, and a copy of which location, with the said terms and conditions, is hereto annexed and marked "A."

9 Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company constructed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the pavement upon Millbury street and particularly upon that portion thereof lying between Vernon square and the bridge over the Blackstone river at Quinsigamond, except that part lying between the westerly or southerly rail and the westerly or southerly curb between Cambridge street and said bridge, all of which portion was paved originally by said respondent company, and was required to be so paved by the conditions of said location, has become worn out, uneven, rough, unfit for further use and dangerous to travel, and said respondent company has failed to maintain said pavements and to keep said pavements in repair to the satisfaction of the proper city officers of the city of Worcester; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance and keeping in proper repair of pavements upon said Millbury street; but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance and keeping in proper repair of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain and keep in proper repair said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain and keep in proper repair said pavements.

Wherefore your petitioner prays that—

1. A mandatory injunction may issue against said defendant company to direct it forthwith to put in proper repair the pavements upon said portions of Millbury street.

2. A mandatory injunction may issue against said defendant company to direct it to maintain and keep in proper repair the pavements upon said portions of Millbury street.

3. An injunction may issue to compel said defendant company to perform all duties and obligations imposed on it by said location with reference to pavements.

4. For such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
*Street Commissioner.*

12 WORCESTER, *ss:*

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me—

ERNEST I. MORGAN,
*Justice of the Peace.*

13 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track on Trumbull street, Green and Millbury street, and Greenwood street to Millbury line. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore; it is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester, as follows to wit: Beginning at a point in Trumbull street at its intersection with the northerly line of Park street; thence crossing Trumbull square and continuing southerly along Green street to Millbury street; thence southerly along Millbury street to the terminus of the present track at Greenwood street,

14 and the same is hereby accordingly located upon the following conditions:

First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving over and upon said location and streets, as follows: in Green street from the Boston and Albany Railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location, for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to the bridge at Quinsigamond, crossing the Blackstone river between the rails, between the tracks and outside of the tracks to the line of the curb-

stone on each side of said location over such portions of said
15 street as are at present unpaved, and said company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by the said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of said streets, and at such points in the location of said tracks where the surface water is impeded or obstructed, such means for its disposal shall be provided as shall meet the approval of said committee.

16 Fourth. All necessary strengthening of road bridges shall be made by said company, and the expense thereof shall be borne by it, and whatever strengthening of bridges is necessary shall be determined by the joint standing committee on highways and sidewalks.

Fifth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks and that the position of all turnouts, cross-overs and spur tracks shall be located by said committee.

Sixth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks and shall be located at such points along the line of said location as the said committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire shall be attached to said poles at such height as to maintain said trolley-wire at every point
17 not less than eighteen feet above the surface of the street.

Seventh. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition, and to the satisfaction of said committee and whenever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting said wires to be done to the acceptance of said committee, and under the direction of the superintendent of fire alarm telegraph.

Eighth. At all such points where the stringing of feed, trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets, and all expense incurred in the changing of said bridges, brackets, or other appliances shall be paid for by said railway company.

Ninth. That in the care and maintenance of said railway the removal of snow and other obstructions from said locations shall
18 be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

Tenth. That the acceptance of this decree shall be made within thirty days from the date of said decree and the construction of said tracks shall be commenced within three months from the date of said acceptance, and be completed and in operation within eighteen months thereafter.

Eleventh. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Accepted, Worcester, May 9th, 1893.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and thereupon on said day a subpœna was issued returnable on the first Monday of March, 1901, at Worcester, as follows, to wit:—

19 [L. S.] COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,* }

To The Worcester Consolidated Street Railway Co., a duly organized corporation having its usual place of business at Worcester, in the county of Worcester, Greeting:

We command you that you appear before our justices of our superior court, at Worcester, within our county of Worcester, on the first Monday of March next, then and there to answer to a bill of complaint exhibited against you in our said court, by City of Worcester, a municipal corporation within said county of Worcester.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, Albert Mason, Esquire, the eighteenth day of February, in the year of our Lord one thousand nine hundred and one.

W. W. MACOMBER, *Ass't Clerk.*

20 And return of service on said subpœna was afterwards made by the officer who served the same in the words and figures following, to wit:

WORCESTER, *ss:*

WORCESTER, *February 18th, A. D.* 1901.

By virtue hereof I this day summoned the within named Worcester Consolidated Street Railway Company to appear at court and answer as within directed by giving in hand to Albert H. Stone its treasurer a true and attested copy of this precept.

| | |
|---|---|
| Fees: Service | .50 |
| Copy | 1.00 |
| Travel | .16 |
| | $1.66 |

W. W. SCOTT,
*Deputy Sheriff.*

21 And on the ninth day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

*Defendant's Demurrer.*

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to maintain its petition, and assigns the
22 following causes for its demurrer.

1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said plaintiff.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this defendant, and that this defendant does not owe any duty and is under no obligations imposed by law to the plaintiff.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this defendant in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which location is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
23 impose under the laws in force at the date of granting said extension of location of the defendant's tracks the condition that the defendant should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the defendant's tracks the restriction that the defendant should maintain block paving or any other form of paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the defendant's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the defendant's tracks and eighteen inches on each side of the portion occupied by the defendant's tracks.

6. For that by the general laws now in force this defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

7. For that it is the duty of the city of Worcester and the
24 proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this defendant derived its charter and all its corporate powers has by statute relieved this defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost to said city of the work done by it, which it was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it no where appears in said petition that this defendant has not duly and punctually paid said excise tax in the manner provided by law.

25 10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said defendant the cost of all work done by it which

prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the plaintiff, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WORCESTER CONSOLIDATED ST. RY. CO.,
By WARREN & GARFIELD, *Its Attorneys.*

I, Bentley W. Warren, one of the attorneys of the above named respondent, The Worcester Consolidated Street Railway Company hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

BENTLEY W. WARREN.

Filed by c. Apr. 9, 1901.

26 And on said ninth day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Complainant,

—

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Respondent.

*Answer of Respondent.*

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceedings, and for answer admits the allegations contained in the first, second, fourth and fifth paragraphs of the petition.

It admits the allegations of facts contained in the third paragraph of said petition, except that it denies that the terms and conditions of the location as therein referred to were required by the
27 public interest.

It denies each and all the allegations in the sixth paragraph of said petition contained.

(1.) And further answering the respondent says that the petitioner is not entitled to the issuance of an injunction out of this court because its petition is not properly signed by or on behalf of

the City of Worcester, and is not brought by the proper party to enforce said alleged right.

(2.) And further answering the respondent says that the petition should not be brought by said city because said city has no control or jurisdiction over this respondent.

(3.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of 1898, and all other laws of said Commonwealth, said respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

(4.) And further answering the respondent says that the condition in the grant of the extension of its location, a copy of which
28 grant of extension is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location.

(5.) And further answering the respondent says that the condition that the street railway company should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets those portions of the streets occupied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose, and was invalid and void and of no effect and not binding upon this respondent.

(6.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of the year 1898 this respondent was relieved from the duty of keeping in repair any portion of the streets, roads and bridges and was required instead of per-
29 forming that duty to pay an excise tax to the various cities and towns in which it operated its railway. And said respondent further says that it has duly and punctually paid to the City of Worcester the amount of all taxes assessed upon said respondent under the provisions of said act and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax. And this respondent says that said city has never taken proceedings to have the amount of said tax increased according to law.

(7.) And further answering the respondent says that it is the duty of said city to keep in repair, at the expense of said city, highways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

(8.) And further answering the respondent denies that it has failed

to maintain and keep in repair any pavements which it is re-
30 quired by law to maintain and keep in repair; and further denies that any portions of the streets named in said location have become or are unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.
P.

Filed by c. Apr. 9, 1901.

Thereupon, on the fourteenth day of June, 1901, the parties appeared and a hearing was had upon the petition and demurrer, and upon consideration thereof the court ordered the demurrer sustained and the petition dismissed by decree as follows, to wit:—

31 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,* }

Superior Court. In Equity.

CITY OF WORCESTER }
*vs.* } # 1437.
WORCESTER CONSOLIDATED STREET RAILWAY CO. }

*Decree.*

This cause came on to be heard at this time and was argued by counsel upon the pleadings, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the defendant's demurrer be sustained and that the plaintiff's bill be, and the same hereby is, dismissed.

By the court.
Attest: W. W. MACOMBER,
*Ass't Clerk.*

Filed June 14th, 1901.

32 From this decree of the court the plaintiff appealed to the next sitting of the supreme judicial court. On the tenth day of October, 1901, the petitioner filed a motion to amend its bill, said motion being in the words following, to wit:

WORCESTER, *ss*:

Superior Court. In Equity.

CITY OF WORCESTER
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } No. 1437.

*Plaintiff's Motion.*

The plaintiff asks leave to amend its bill heretofore filed in the above entitled cause by joining as parties plaintiff Philip J. O'Connell, W. Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, all of said Worcester.

And to further amend said bill by striking out the first paragraph and inserting in place thereof the following:

"First. That said city of Worcester is a municipal corporation within said county and Commonwealth, that said Philip J.
33 O'Connell is mayor of said city of Worcester and W. Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, are all the members of the board of aldermen of said city of Worcester."

By ARTHUR P. RUGG, *Solicitor.*

And on said tenth day of October, 1901, said motion was allowed, the defendant consenting thereto; and thence the case was continued, and afterwards, to wit, on the seventeenth day of July, 1902, the parties appeared and it was ordered by said supreme judicial court, by its rescript, as follows, to wit:

34 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
*vs.*
WORCKSTER CONSOLIDATED STREET RAILWAY COMPANY. }

Pending in the superior court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Decree sustaining demurrer and dismissing bill affirmed.

By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

35 And on the fourth day of August, 1902, the following decree for dismissal was issued by said superior court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

*Final Decree.*

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript from the supreme judicial court for the Commonwealth, it is ordered that this petition be dismissed.

By the court,
Attest: T. S. JOHNSON, *Clerk.*

Aug. 4, 1902.

36 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Seal of the Superior Court.

Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

T. S. JOHNSON, *Clerk.*

37 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER and BOARD OF ALDERMEN OF THE CITY OF Worcester
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY CO.

*Petition for Writ of Error and Assignment of Errors.*

The City of Worcester and Board of Aldermen of the City of Worcester, plaintiffs in the above-entitled action, represent that errors of law appear in the record in this case:

That the board of aldermen of the city of Worcester, acting under section twenty-one of chapter one hundred thirteen of the Public Statutes of Massachusetts, authorized the defendant street railway company to extend the location of its tracks within the city of

Worcester in Trumbull, Green, Millbury and Greenwood streets in said Worcester on the tenth day of April, eighteen hundred and ninety three, and granted said authority under certain restrictions and conditions set out at length in the record in said cause;

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiffs' contention and adversely
38 to the existence of the Federal rights claimed.

Wherefore they respectfully petition for a writ of error to the superior court of the Commonwealth of Massachusetts sitting at Worcester within and for the county of Worcester, and file herewith their assignment of errors as follows, to wit:

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface material of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the
39 streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

CITY OF WORCESTER AND
BOARD OF ALDERMEN OF THE
CITY OF WORCESTER,
By ARTHUR P. RUGG,
*City Solicitor and Attorney for All said Plaintiffs.*

39½ [Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

40 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
*vs.*
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
*vs.*
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
*vs.*
SAME.

SAME
*vs.*
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

41 BARKER, *J.*:

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
42 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
43 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
44 mendation that authority should be granted to require "that a direct return should be made to the treasury of the munici-

pality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more
45 of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there
46 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law, the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

*So ordered.*

46½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

47 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * 16th day of November next, pursuant to a writ of error filed in the the clerk's office of the † superior court of the Commonwealth of Massachusetts in the county of Worcester wherein The City of Worcester, and others are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of Massachusetts, this 17th day of October, in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

ALBERT MASON, *C. J. S. C.*

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,

*Attorney for the Worcester Consolidated Street Railway Co.*

48 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record of the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, on a bill in equity, filed in said superior court, determined and annexed to and transmitted with said record, of—

II. The application for writ of error and assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court, this twelfth day of November, in the year of our Lord, one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

[Endorsed:] #1437 (Bill in equity.) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,139. Massachusetts superior court. Term No. 488. The City of Worcester and The Board of Aldermen of the City of Worcester, plaintiffs in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23d, 1903. File No. 19,139.

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 147.

THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

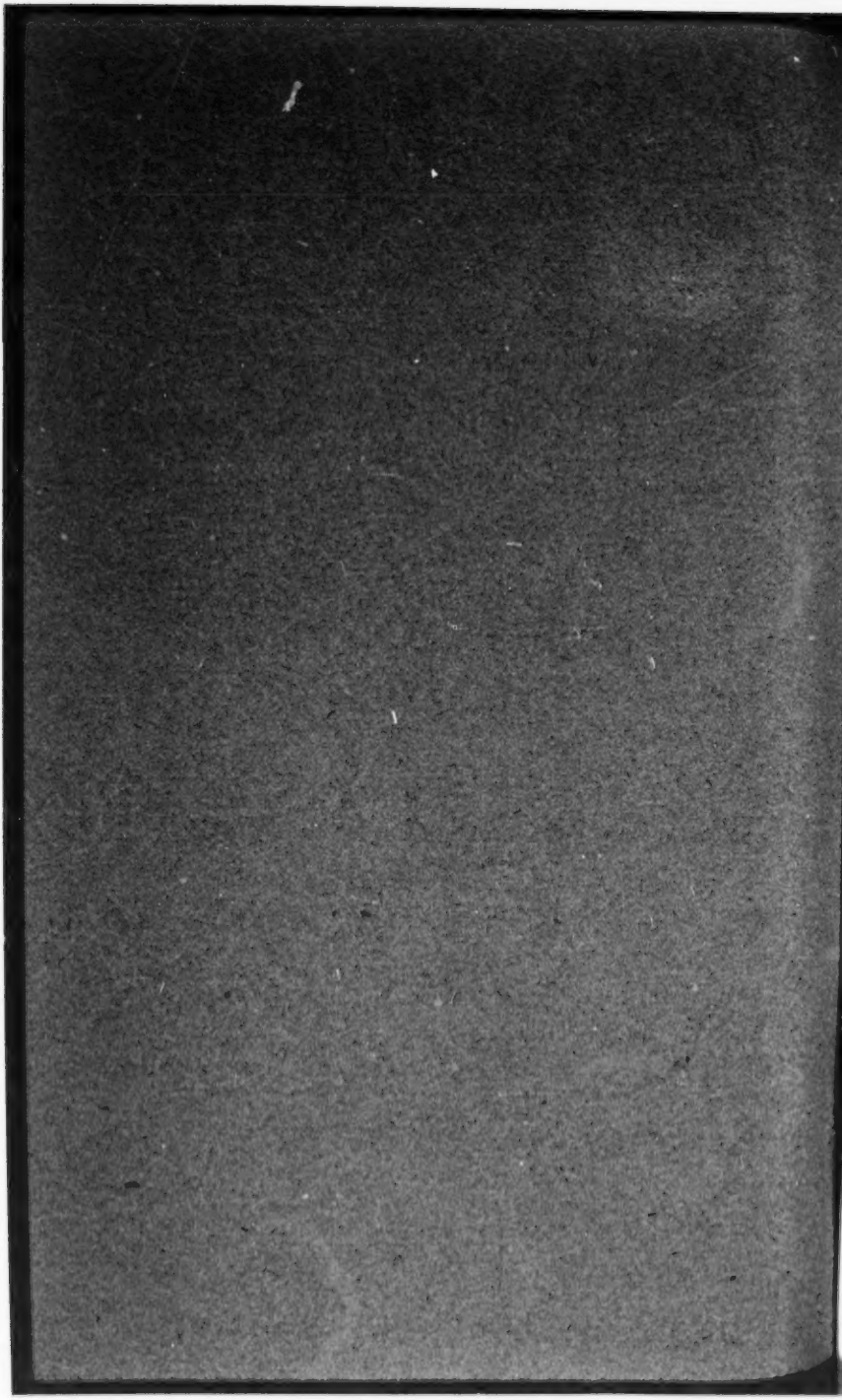
*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED NOVEMBER 23, 1903.

(19,140.)



# (19,140.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 489.

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THE CITY OF WORCESTER, PLAINTIFF IN ERROR,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

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IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester plaintiff and The Worcester Consolidated Street Railway Company defendant, in an action of contract wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said City of Worcester as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the sixteenth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts.*

Allowed by—
ALBERT MASON,
*Chief Justice Superior Court.*

1—489

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said superior court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk*.

3 *Bond*, 1438.

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court of Massachusetts holden at Worcester within and for the county of Worcester, in
4 a suit depending in said court, between The City of Worcester and others, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in a bill in equity a judgment and final order was rendered against the said plaintiff- dismissing *its* said bill and the said plaintiff- having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester and others shall prosecute their writ of error to effect,

and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
THE AMERICAN BONDING CO.,
5 [L. S.] By JOHN R. THAYER, *Vice Pres't.*

Attest: HENRY A. MACGOWAN, *Ass't Sec'y.*

Approved:
ALBERT MASON, *C. J. S. C.*

Bond approved.
FRANCIS H. DEWEY,
*Att'y for Wor. Con. St. R'lway Co.*

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Albert Mason, chief justice, and filed November 7th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] # 1438. (Equity.) City of Worcester *vs.* Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } *ss.:*
*Worcester,* }

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court, begun and holden at Fitchburg, within and for our said county of Worcester, on the first Monday of June, being the second day of said month, in the year of our Lord one thousand nine hundred and two, it is this contained:—the following being the entire record of the case.

7 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,

—

THE WORCESTER CONSOLIDATED STREET RAILWAY CO., a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

To the honorable justices of the superior court:

Respectfully represents the said City of Worcester,—

First. That it is a municipal corporation within said county and Commonwealth.

8 Second. That the Worcester Consolidated Street Railway Company is a corporation duly organized under the laws of this Commonwealth, and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

Third. That on the second day of January, 1893, the directors of said Worcester Consolidated Street Railway Company presented a petition to the mayor and board of aldermen of the city of Worcester, praying that a location or extension of location might be granted to the said Worcester Consolidated Street Railway Company in Pleasant street westerly in and from Park avenue to June street in said Worcester; that due notice was given of said petition and hearing thereon, all as required by law and that thereafter to wit, on the tenth day of April, 1893, said petition was granted by said mayor and board of aldermen of the city of Worcester and a location was granted to said Worcester Consolidated Street Railway Company, which location was granted with certain terms and conditions annexed thereto required by the public interests and a copy of which location, with the said terms and conditions, is hereto annexed and marked "A."

9 Fourth. That thereafter and within thirty days from the date of receiving notice of granting said location as aforesaid by said board of aldermen of the city of Worcester, to wit, on the ninth day of May, 1893, said location was duly accepted in writing by said board of directors of said Worcester Consolidated Street Railway Company, all as required by law and said acceptance was by said respondent company filed with the city clerk of the city of Worcester.

Fifth. That thereafter and within the time, and as required by law, said Worcester Consolidated Street Railway Company con-

structed its tracks as authorized by said location and began operating its cars over them and paved said streets as required by the conditions of said location, from curb to curb.

Sixth. That by reason of the settling of the tracks, rails, sleepers, crossbars and other track constructions, and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street, the block paving between the rails of each track, in the whole space
10 between the tracks and for the space of eighteen inches outside the tracks, has become worn out, uneven, rough, unfit for further use and dangerous for travel; that said Worcester Consolidated Street Railway Company has been repeatedly requested to comply with the terms of its said location and especially that of clause second thereof, relating to maintenance of pavements upon said Pleasant street, but that said Worcester Consolidated Street Railway Company, without right, wantonly neglects and utterly refuses to comply with said terms of its said location as to maintenance of pavements upon said street and does nothing, and through its officers avers that it will do nothing to maintain said pavements and to relieve the public travel from the danger and menace existing by reason of its failure to maintain said pavements.

Wherefore your petitioner prays that—

1. A mandatory injunction may issue against said defendant company and direct it forthwith to put in proper repair the said block pavement in that portion of Pleasant street aforesaid.

2. A mandatory injunction may issue against said defend-
11 ant company to direct it to maintain and keep in proper repair block pavements upon that portion of Pleasant street aforesaid.

3. An injunction may issue to compel said defendant company to perform all duties and obligations imposed on it by said location with reference to pavements.

4. For such further orders and decrees in the premises as to law and justice may appertain.

WRIGHT S. PRIOR,
*Street Commissioner.*

WORCESTER, *ss*:

FEBRUARY 16, 1901.

Personally appeared Wright S. Prior, the street commissioner of the city of Worcester, and in behalf of said petitioner made oath to all allegations of the foregoing petition as being true to the best of his knowledge and belief.

Before me,—

ERNEST I. MORGAN,
*Justice of the Peace.*

12 "A."

IN BOARD OF MAYOR AND ALDERMEN, *April* 10, 1893.

Whereas: The Worcester Consolidated Street Railway Company has presented its petition to this board asking that it may be authorized to locate and extend its tracks in said Worcester which petition in part is as follows:

A double track from its present tracks in Park avenue at its junction with Pleasant street through Pleasant street, to June street. And due notice having been given to all parties interested and a hearing having been given on said petition in accordance with said notice.

Now, therefore: It is ordered that the said corporation be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester as follows to wit:

Beginning at a point on the easterly line of Park avenue at its intersection with Pleasant street, thence westerly crossing said Park avenue and continuing westerly and northerly along said Pleasant street to the southerly line of June street, and the same is hereby accordingly located upon the following conditions:

13 First. That said company shall use for its tracks a rail satisfactory to and approved by the joint standing committee on highways and sidewalks.

Second. That said company shall lay and maintain block paving between the rails of each track, the whole space between the tracks and for the space of eighteen inches outside of the tracks. Said paving blocks shall be of full size and their quality and manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks. And for the remaining width of said Pleasant street, for the entire length of said location the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company.

Third. That the streets in which said tracks are located are to be left in a condition satisfactory to the joint standing committee on highways and sidewalks for the full width of the roadway of said streets, and at such points in the location of said tracks where surface water is impeded or obstructed, such means for its

14 disposal shall be provided as shall meet the approval of said committee.

Fourth. That the manner of laying the tracks, the location, grade and alignment of the same to be done under the direction and approval of the joint standing committee on highways and sidewalks and that the position of all turnouts, cross-overs and spur tracks shall be located by said committee.

Fifth. All posts used in such construction shall be straight and of a pattern satisfactory to the joint standing committee on highways and sidewalks and shall be located at such points along the line of said location as the committee may direct, and set at such depth in the ground as to make their support substantial and adequate; and the cross wires or brackets, as the case may require for the support of the trolley-wire shall be attached to said poles at such height as to maintain said trolley-wire at every point not less than eighteen feet above the surface of the street.

Sixth. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition, and to the satisfaction of said committee, and whenever trolley and feed wires are used, suitable guard wires of a size satisfactory to said committee shall be erected and maintained. The work connected with erecting of said wires to be done to the acceptance of said committee, and under the direction of the superintendent of fire alarm telegraph.

Seventh. At all such points where the stringing of feed, trolley or guard wires may in any way interfere with the bridges, brackets or other appliances used in the maintenance and operation of electric street lights, such changes as shall be required in their location or height shall be done under the direction of the superintendent of lighting streets, and all expense incurred in the changing of said bridges, brackets, or other appliances shall be paid for by said railway company.

Eighth. That in the care and maintenance of said railway the removal of snow and other obstructions from said locations shall be done to the acceptance and satisfaction of the joint standing committee on highways and sidewalks.

Ninth. That the acceptance of this decree shall be made within thirty days from the date of said decree, and the construction of said tracks shall be commenced within three months from the date of said acceptance, and be completed and in operation within eighteen months thereafter.

Tenth. That the tracks of this location shall not be used or the road operated until all work required in connection with said location shall have been approved and accepted by the joint standing committee on highways and sidewalks.

Worcester, May 9th, 1893.

Accepted.

This petition was filed and entered in this court on the eighteenth day of February, 1901, and thereupon on said day a subpœna was issued returnable on the first Monday of March, 1901, at Worcester, as follows, to wit:—

17 [L. S.] COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

To The Worcester Consolidated Street Railway Co., a duly organized corporation having its usual place of business at Worcester, in the county and Commonwealth aforesaid, Greeting:

We command you that you appear before our justices of our superior court, at Worcester, within our county of Worcester, on the first Monday of March next, then and there to answer to a bill of complaint exhibited against you in our said court, by the City of Worcester, a municipal corporation in the county of Worcester and Commonwealth of Massachusetts.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, Albert Mason, Esquire, the eighteenth day of February in the year of our Lord one thousand nine hundred and one.

W. W. MACOMBER, *Ass't Clerk.*

18 And return of service on said subpœna was afterwards made by the officer who served the same in the words and figures following, to wit:

WORCESTER, *ss:*

WORCESTER, *February* 18*th*, *A. D.* 1901.

By virtue of this precept I this day summoned the within named Worcester Consolidated Street Railway Company to appear at court and answer as within directed by giving a true and attested copy hereof in hand to Albert H. Stone, treasurer of said company.

| | |
|---|---|
| Fees: Service | .50 |
| Copy | 1.00 |
| Travel | .16 |
| | 1.66 |

W. W. SCOTT,
*Deputy Sheriff.*

19 And on the ninth day of April, 1901, the respondent appeared and filed its demurrer as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Plaintiff,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Defendant.

*Defendant's Demurrer.*

And now comes the Worcester Consolidated Street Railway Company and demurs to the petition of the City of Worcester, and says that the said petition and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to maintain its petition, and assigns the
20 following causes for its demurrer.

1. For that it no where appears in said petition that said petition is brought or has been authorized by the city government or other constituted and proper authorities of said plaintiff.

2. For that the city of Worcester as a municipal corporation has no interest in the subject matter of said petition, and has no power or control over this defendant, and that this defendant does not owe any duty and is under no obligations imposed by law to the plaintiff.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this defendant in the location of its tracks upon the streets described in the grant of location dated April 10, 1893, a copy of which location is annexed to the petition herein, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to
21 impose under the laws in force at the date of granting said extension of location of the defendant's tracks the condition that the defendant should lay block paving in any portion of any street occupied by its tracks under said order of extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said extension of location of the defendant's tracks the restriction that the defendant should maintain block paving or any other form of paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the

defendant's tracks; nor in the case of such streets as were unpaved any portions thereof except those occupied by the defendant's tracks and eighteen inches on each side of the portion occupied by the defendant's tracks.

6. For that by the general laws now in force this defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

22 7. For that it is the duty of the city of Worcester and the proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this defendant derived its charter and all its corporate powers has by statute relieved this defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair, and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said city of Worcester, and if said portion of said excise tax so payable to the city of Worcester is not sufficient to yield to said city an amount equal to the cost to said city of the work done by it, which it was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

23 9. For that it no where appears in said petition that this defendant has not duly and punctually paid said excise tax in the manner provided by law.

10. For that it no where appears in said petition that the portion of said excise tax above referred to has not been sufficient to yield to said defendant the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the plaintiff, The City of Worcester, has not set out in said petition any facts which entitled it to the writ prayed for.

WORCESTER CONSOLIDATED ST. RY. CO.,
By WARREN & GARFIELD, *Its Attorneys.*

I, Bentley W. Warren, one of the attorneys for the above named respondent, The Worcester Consolidated Street Railway Company certify that I am of opinion that there is such probable

24 ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

BENTLEY W. WARREN.

Filed by c. Apr. 9, 1901.

25 And on said ninth day of April, 1901, said respondent filed its answer to said petition as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester.* } *ss:*

Superior Court. In Equity.

CITY OF WORCESTER, a Municipal Corporation within the County of Worcester and Commonwealth of Massachusetts, Complainant,

—

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY, a Duly Organized Corporation Having its Usual Place of Business at Worcester, in the County and Commonwealth Aforesaid, Respondent.

*Answer of Respondent.*

And now comes the respondent, The Worcester Consolidated Street Railway Company, in the above entitled proceedings, and for answer admits the allegations contained in the first, second, fourth and fifth paragraphs of the petition.

26 It admits the allegations of facts contained in the third paragraph of said petition, except that it denies that the terms and conditions of the location as therein referred to were required by the public interest.

It denies each and all the allegations in the sixth paragraph of said petition contained.

(1.) And further answering the respondent says that the petitioner is not entitled to the issuance of an injunction out of this court because its petition is not properly signed by or on behalf of the City of Worcester, and is not brought by the proper party to enforce said alleged right.

(2.) And further answering the respondent says that the petition should not be brought by said city because said city has no control or jurisdiction over this respondent.

(3.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of 1898, and all other laws of said Commonwealth, said respondent is not required to keep any portion of the surface material of streets, roads and bridges in repair.

27 (4.) And further answering the respondent says that the condition in the grant of the extension of its location, a copy of which grant of extension is annexed to the petition in this proceeding, that the respondent should pave with block pavement any portion of the street was not within the power of the board of mayor and aldermen to impose under the provisions of law existing at the date of said grant of extension of location.

(5.) And further answering the respondent says that the condition that the street railway company should keep in repair any portion of the surface material of any street in which its tracks were laid, except in the case of paved streets those portions of the streets occu-

pied by its tracks, and in the case of unpaved streets those portions occupied by its tracks and in addition eighteen (18) inches on each side of the portion occupied by its tracks, was not within the power of said board of mayor and aldermen to impose, and was invalid and void and of no effect and not binding upon this respondent.

28 (6.) And further answering the respondent says that by the provisions of chapter 578 of the Acts of the year 1898 this respondent was relieved from the duty of keeping in repair any portion of the streets, roads and bridges and was required instead of performing that duty to pay an excise tax to the various cities and towns in which it operated its railway. And said respondent further says that it has duly and punctually paid to the City of Worcester the amount of all taxes assessed upon said respondent under the provisions of said act and that if the amount of the taxes so assessed upon and paid by this respondent is insufficient to yield to said city the cost of the work done by it, which it was not previously required by law to do, said act provides a method of increasing the amount of said tax. And this respondent says that said city has never taken proceedings to have the amount of said tax increased according to law.

(7.) And further answering the respondent says that it is the duty of said city to keep in repair, at the expense of said city, high-

29 ways, townways and streets mentioned or referred to in the petition so that the same may be reasonably safe and convenient for travelers at all seasons of the year.

(8.) And further answering the respondent denies that it has failed to maintain and keep in repair any pavements which it is required by law to maintain and keep in repair; and further denies that any portions of the streets named in said location have become or are unfit for further use and dangerous to travel.

By its attorneys, WARREN & GARFIELD.
P.

Filed by c. Apr. 9, 1901.

Thereupon on the fourteenth day of June, 1901, the parties appeared and a hearing was had upon the petition and demurrer, and upon consideration thereof the court ordered the demurrer sustained and the petition dismissed by decree as follows, to wit :—

30 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,*

Superior Court. In Equity.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY CO. } # 1438.

*Decree.*

This cause came on to be heard at this time and was argued by counsel upon the pleadings, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the defendant's demurrer be sustained and that the plaintiff's bill be, and the same hereby is, dismissed.

By the court.
Attest: W. W. MACOMBER, *Ass't Clerk.*

Filed June 14th, 1901.

31 From this decree of the court the plaintiff appealed to the next sitting of the supreme judicial court. On the tenth day of October, 1901, the petitioner filed a motion to amend its bill, said motion being in the words following, to wit:

WORCESTER, ss:

Superior Court. In Equity.

CITY OF WORCESTER
*vs.*
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } No. 1438.

*Plaintiff's Motion.*

The plaintiff asks leave to amend its bill heretofore filed in the above entitled cause by joining as parties plaintiff Philip J. O'Connell, W. Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, all of said Worcester.

And to further amend said bill by striking out the first paragraph and inserting in place thereof the following:

32 "First. That said city of Worcester is a municipal corporation within said county and Commonwealth, that said Philip J. O'Connell is mayor of said city of Worcester and W.

Levi Bousquet, Louis J. Kendall, Edwin G. Barrett, John W. Mitchell, H. Augustus Harrington, John E. Lancaster, Lucian B. Stone, Wilhelm G. Lichtenfels, Edward J. McMahon, are all the members of the board of aldermen of said city of Worcester."

By ARTHUR P. RUGG, *Solicitor.*

And on said tenth day of October, 1901, said motion was allowed, the defendant consenting thereto; and thence the case was continued, and afterwards, to wit, on the seventeenth day of July, 1902, the parties appeared and it was ordered by said supreme judicial court, by its rescript, as follows, to wit:

33 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the superior court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Decree sustaining demurrer and dismissing bill affirmed.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

34 And on the fourth day of August, 1902, the following decree for dismissal was issued by said superior court, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss.:*

Superior Court.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

*Final Decree.*

And now in the above entitled petition, upon consideration thereof and in accordance with a rescript from the supreme judicial

court for the Commonwealth, it is ordered that this petition be dismissed.

By the court,

Attest: T. S. JOHNSON, *Clerk.*

Aug. 4, 1902.

35 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Seal of the Superior Court. Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

T. S. JOHNSON, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER and BOARD OF ALDERMEN OF THE CITY OF Worcester
*v.*
WORCESTER CONSOLIDATED STREET RAILWAY CO.

*Petition for Writ of Error and Assignment of Errors.*

The City of Worcester and Board of Aldermen of the City of Worcester, plaintiffs in the above-entitled action, represent that errors of law appear in the record in this case:

That the board of aldermen of the city of Worcester, acting under section twenty-one of chapter one hundred thirteen of the Public Statutes of Massachusetts, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester in Pleasant street westerly in and from Park avenue to June street in said Worcester on the tenth day of April, eighteen hundred and ninety three, and granted said authority under certain restrictions and conditions set out at length in the record in said cause;

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiffs' contentions and adversely to the to the existence of the Federal rights claimed.

Wherefore, they respectfully petition for a writ of error to the
37 superior court of the Commonwealth of Massachusetts sitting at Worcester within and for the county of Worcester, and file herewith their assignment of errors, as follows, to wit:—

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligation so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the constitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the strets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitu-
38 tion of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

CITY OF WORCESTER AND
BOARD OF ALDERMEN OF THE
CITY OF WORCESTER,
By ARTHUR P. RUGG,
*City Solicitor and Attorney for All said Plaintiffs.*

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

39 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
*vs.*
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
*vs.*
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
*vs.*
SAME.

SAME
*vs.*
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

40 BARKER, *J.*:

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court

sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
41 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
42 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
43 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a

limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments, became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more
44 of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that 'street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there
45 might be a question. St. 1898, c. 578, § 1. Springfield *v.* Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the deter-

mination of these cases, and we express no opinion upon the question.

The result is that in the action at law the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

*So ordered.*

45½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

46 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * 16th day of November next, pursuant to a writ of error filed in the clerk's office of the † superior court of the Commonwealth of Massachusetts, in the county of Worcester wherein The City of Worcester, and others, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of Massachusetts, this 17th day of October, in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

ALBERT MASON, *C. J. S. C.*

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,

*Attorney for the Worcester Consolidated Street Railway Co.*

47 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss*:

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record of the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, on a bill in equity, filed in said superior court, determined and annexed to and transmitted with said record, of—

II. The application for writ of error and assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court, this twelfth day of November, in the year of our Lord, one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

[Endorsed:] #1438 (Bill in equity.) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,140. Massachusetts superior court. Term No. 489. The City of Worcester, plaintiff in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23, 1903. File No. 19,140.

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 464.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

vs.

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

FILED NOVEMBER 25, 1903.

(19,144)

# (19,141.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 490.

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THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER, PLAINTIFFS IN ERROR,

*vs.*

THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

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IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The City of Worcester and The Board of Aldermen of the City of Worcester plaintiffs and The Worcester Consolidated Street Railway Company defendant, in a bill in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said City of Worcester and Board of Aldermen of the City of Worcester as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the sixteenth day of November next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of October in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts.*

Allowed by—
ALBERT MASON.
*Chief Justice Superior Court.*

1—490

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss*:

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court *court*, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Theodore S. Johnson clerk of said superior court have hereto set my hand and the seal of said court this twelfth day of November A. D. 1903.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk*.

3 *Bond*, 1450.

Know all men by these presents, that the City of Worcester, a municipal corporation within the Commonwealth of Massachusetts, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation duly established under the laws of Maryland, and having its principal office in said Maryland, are held and firmly bound unto the Worcester Consolidated Street Railway Company, a corporation duly established by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, in the full and just sum of five hundred dollars ($500.00) to be paid to the said Worcester Consolidated Street Railway Company or its attorney, successors and assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of September in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court of Massachusetts holden at Worcester within and for the county of Worcester, in
4 a suit depending in said court, between The City of Worcester, plaintiffs, and The Worcester Consolidated Street Railway Company, defendant, in an action of contract a judgment and final order was rendered against the said plaintiff-, directing judgment to be entered for the defendant and the said plaintiff- having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Worcester Consolidated Street Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said City of Worcester — and shall prosecute their writ of error to effect,

and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF WORCESTER,
[L. S.] By F. W. WHITE, *City Treasurer, and*
ARTHUR P. RUGG, *City Solicitor.*
5 THE AMERICAN BONDING CO.,
By JOHN R. THAYER, *Vice Pres't.*

Attest: HENRY A. MACGOWAN, *Ass't Sec'y.*

Approved:
ALBERT MASON, *C. J. S. C.*

Bond approved.
FRANCIS H. DEWEY,
*Att'y for Wor. Con. St. R'lway Co.*

(Endorsed:) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company. Bond. Copy. Bond approved by Albert Mason, chief justice, and filed November 7th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.
Attest: T. S. JOHNSON, *Clerk.*

5½ [Endorsed:] # 1450. City of Worcester *vs.* Worcester Consolidated Street Railway Company. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,*

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court, begun and holden at Fitchburg, within and for our said county of Worcester, on the first Monday of June, being the second day of said month, in the year of our Lord one thousand nine hundred and two, it is this contained:—the following being the entire record of the case.

7 [L. S.] COMMONWEALTH OF MASSACHUSETTS, } ss:
*Worcester,*

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Worcester Consolidated Street Railway Company, a corporation duly organized under the laws of said Commonwealth and having a usual place of

business in Worcester in said county, to the value of twenty-five thousand dollars, and summon the said defendant (if it may be found in your precinct) to appear before our justices of our superior court, at Worcester, within and for our said county of Worcester, on the first Monday of March next; then and there, in our said court, to answer unto the City of Worcester, a municipal corporation within said county.

In an action of contract.

To the damage of said plaintiff, as it saith, the sum of twenty-five thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, Albert Mason, Esquire, at Worcester, the sixteenth day of February in the year of our Lord one thousand nine hundred and one.

T. S. JOHNSON, *Clerk.*

8 (*Copy of Officer's Return on Back of Writ.*)

By rules of court, officers' fees must be stated in separate items, and claims for extra compensation for removing or keeping property must be sworn to.

WORCESTER, *ss:*

WORCESTER, *February 18th, A. D.* 1901.

By virtue of this writ, I this day at forty minutes past eleven in the forenoon, attached as the property of the within named defendant cor. all its right, title and interest in and to any real estate in Worcester or elsewhere in the county of Worcester, and on the same day deposited an attested copy of this writ without the declaration, and with so much of my return thereon as relates to the attachment of real estate, in the office of the register of deeds for the Worcester district of said county, and afterwards on the same eighteenth day of February A. D. 1901 gave in hand to Albert H. Stone, treasurer of said defendant corporation a summons for its appearance at court as within directed.

W. W. SCOTT,
*Deputy Sheriff.*

| | | |
|---|---|---|
| Fees: Service | | 1.00 |
| Travel, — miles | | .16 |
| " over 40 miles, — miles | | |
| Copy | | 1.00 |
| Travel to record, — miles | | .08 |
| Clerk's fee | | .25 |
| Use of team, — miles | | |
| | | $2.49 |

9 *Declaration.*

WORCESTER, *ss:*

Superior Court.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } No. 1450.

Plaintiff's declaration.

Count one. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the twenty-fourth day of April, 1893, the board of aldermen of the city Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the
10 location of its tracks in said city of Worcester as follows, to wit: Beginning at the end of the present double track in said Pleasant street at West street, thence westerly along said Pleasant street to the easterly line of Park avenue, and the same is hereby accordingly located upon the following conditions:"

That ten different conditions are set forth in said order, among which is the following:

"Second. The said company shall lay and maintain block paving between the rails, between the tracks, and outside of the tracks to the line of the curbstones for the entire length of said location and the quality of the blocks and manner of laying the same shall meet with the acceptance of the joint standing committee on highways and sidewalks. In case said company shall fail to keep the paving in a proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

The said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester, and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said street, as required by the condition of said location, from curb to curb.

11 That by reason of the settling of the rails, sleepers, crossbars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pave-

ment upon said Pleasant street between West street and Park avenue became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of fifteen hundred eighty-nine and 21/100 dollars, as set forth in the account hereto annexed, marked "A."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count two. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and
12 particularly under chapter 284 of the laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the twenty-fourth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the end of the present double track in said Pleasant street at West street, thence westerly along said Pleasant street to the easterly line of Park avenue, and the same is hereby accordingly located upon the following conditions:"

That ten different conditions are set forth in said order among which is the following:

"Second. The said company shall lay and maintain block paving between the rails, between the tracks and outside of the tracks to the line of the curbstones for the entire length of said location and the quality of the blocks and manner of laying the same shall meet with the acceptance of the joint standing committee on highways and sidewalks. In case said company shall fail to keep the paving in a proper state of repair, the same may be repaired by said
13 committee and the expense of such repairs shall be paid by said company."

That said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester, and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said street, as required by the conditions of said location, from curb to curb.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Pleasant street between West street and Park avenue became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repestedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of eleven hundred forty-four and 78/100 dollars, as set forth in the account hereto annexed, marked "B."

14 The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count three. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the tenth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 213 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location and extension of its tracks in said city of Worcester as follows, to wit: Beginning at a point in Trumbull street at its intersection with the northerly line of Park street, thence crossing Trumbull square and continuing southerly on Green street to Millbury street, thence southerly on Millbury street to the terminus of the present track at Greenwood street, and the same is hereby accordingly located upon the following conditions:"

The eleven different conditions are set forth in said order, among which is the following:

15 "Second. That said company shall lay and maintain block paving over and upon said location and streets, as follows: In Green street from the Boston and Albany Railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to

the bridge at Quinsigamond, crossing the Blackstone river, between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company.

16 Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by the said company."

The said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said Millbury street, as required by the conditions of said location.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Millbury street between Vernon square and the bridge at Quinsigamond became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with

17 said condition of its said location; by reason whereof the city of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of two thousand one hundred and seventeen and 10/100 dollars, as set forth in the account hereto annexed, marked "C."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count four. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of

constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the eleventh day of May, 1891, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use and extend the location of its tracks in said city of Worcester as follows: From its present tracks in Front street and Washington square through and
18 over Washington square to Shrewsbury street, through and over Shrewsbury street to Belmont street, and through and over Belmont street to a point opposite the center of Lake avenue with the right to use horses or electricity as a motive power. And the same are hereby accordingly located upon the following conditions."

That eight different conditions are set forth in said order, among which is the following:

"Second. That block paving shall be laid and maintained between the rails of its track and for a distance of eighteen (18) inches outside of said rails for the entire distance covered by this location."

That on the twenty-fourth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the present location of said company's tracks in Front street, thence easterly across Washington's square to Shrewsbury street, thence easterly along Shrewsbury street to Belmont street, thence easterly along Belmont street to Plantation street, and the same is
19 hereby accordingly located upon the following conditions:

That ten different conditions are set forth in said order, among which is the following:

"Second. Said company shall lay and maintain block paving along the line of its location as follows: From the Fitchburg Railroad crossing at Washington square to the easterly line of Lyon street, block paving shall be laid between the rails, between the tracks, and outside thereof to the line of the curbstones, and from said Lyon street to the easterly end of this location, block paving shall be laid between the rails, between the tracks and 18 inches outside of the tracks. And it is further provided that from the easterly line of Lyon street to Warden street such portions of the street as are outside of the pavements above specified, shall be paved with a thorough and substantial macadam pavement by the highway department of the city of Worcester, and the expense of the same shall be paid by said company. In case the said company shall fail to keep said pavements in a proper state of repair to the satisfaction of said committee, the same may be repaired by said

committee and the expense of such repairs shall be paid by said company."

That both of said locations were duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter and within the time, and as required by law the defendant constructed its tracks as authorized by said locations and began operating its cars over them and paved said Shrewsbury street, as required by the conditions of said locations.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Shrewsbury street between Lyon street and Belmont street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the conditions of its locations above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said conditions of its said locations; by reason whereof the city of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of three thousand one hundred and twenty-five and 33/100 dollars, as set forth in the account hereto annexed, marked "D."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from August 12, 1899, the date of said demand.

Count five. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the eleventh day of May, 1891, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use and extend the location of its tracks in said city of Worcester as follows: From its present tracks in Front street and Washington square through and over Washington square to Shrewsbury street, through and over Shrewsbury street to Belmont street, and through and over Belmont street to a point opposite the center of Lake avenue, with the right to use horses or electricity as a motive power. And the same are hereby accordingly located upon the following conditions."

That eight different conditions are set forth in said order, among which is the following:

22 "Second. Taht block paving shall be laid and maintained between the rails of its tracks and for a distance of eighteen (18) inches outside of said rails for the entire distance covered by this location."

That on the twenty-fourth day of April, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows to wit: Beginning at the present location of said company's tracks in Front street, thence easterly across Washington square to Shrewsbury street, thence easterly along Shrewsbury street to Belmont street, thence easterly along Belmont street to Plantantion street, and the same is hereby accordingly located upon the following conditions:

That ten different conditions are set forth in said order, among which is the following:

"Second. Said company shall lay and maintain block paving along the line of its location as follows: From the Fitchburg Railroad crossing at Washington square to the easterly line of Lyon street, block paving shall be laid between the rails between the
23 tracks and outside thereof to the line of the curbstones, and from said Lyon street to the easterly end of this location, block paving shall be laid between the rails, between the tracks and 18 inches outside of the tracks. And it is further provided that from the easterly line of Lyon street to Warden street such portions of the street as are outside of the pavements above specified, shall be paved with a thorough and substantial macadam pavement by the highway department of the city of Worcester, and the expense of the same shall be paid by said company. In case the said company shall fail to keep said pavements in a proper state of repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

That both of said locations were duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said locations and began operating its cars over them, and paved said Shrewsbury street, as required by the conditions of said locations.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the or-
24 dinary, common and customary use of said street the pavement upon said Shrewsbury street between the Fitchburg Railroad crossing at Washington square and the easterly line of Lyon street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and

maintain said pavement in compliance with the conditions of its locations above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said conditions of its said locations; by reason whereof the city of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of seven hundred and sixty-three and 27/100 dollars, as set forth in the account hereto annexed, marked "E."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from January 18, 1901, the date of said demand.

Count six. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along
25 and through streets and ways of the city of Worcester.

That on the eighth day of May, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the present tracks in Salisbury street, thence northerly along Grove street to Park avenue, thence northerly along Park avenue to the end of the present track at Chadwick square, and the same is hereby according— located upon the following conditions:"

That eleven different conditions are set forth in said order, among which is the following:

"Second. The said company shall lay and maintain block paving as follows: From Salisbury street to Salisbury pond, block paving shall be laid between the rails, between the tracks and outside thereof to the lines of the curbstones. From Salisbury pond, on its southerly side to the end of this location, block paving shall be laid between the rails and tracks and outside thereof for the space of 18 inches, and for the remaining width of the streets to the lines of the curbstones, macadam pavement shall be laid by the highway
26 department of said city and the expense thereof shall be paid by said company. The quality of the blocks and the manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks and if said company shall fail to keep said pavement in a safe and proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

That said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worcester and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began

operating its cars over them, and paved said Grove street, as required by the condition of said location.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Grove street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to com-
27 ply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of one thousand two hundred and eighty-two and 70/100 dollars, as set forth in the account hereto annexed, marked "F."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from June 14, 1900, the date of said demand.

Count seven. And the plaintiff says the defendant is a corporation duly organized under the laws of the Commonwealth and particularly under chapter 284 of the Laws of 1887, for the purpose of constructing, maintaining and operating a street railway along and through streets and ways of the city of Worcester.

That on the eighth day of May, 1893, the board of aldermen of the city of Worcester, by an order duly adopted under provisions of section 21 of chapter 113 of the Public Statutes, voted that the defendant corporation "be and the same is hereby authorized and empowered to construct, maintain and use the location of its tracks in said city of Worcester as follows, to wit: Beginning at the present tracks in Salisbury street, thence northerly along Grove
28 street to Park avenue, thence northerly along Park avenue to the end of the present track at Chadwick square, and the same is hereby accordingly located upon the following conditions:"

That eleven different conditions are set forth in said order, among which is the following:

"Second. The said company shall lay and maintain block paving as follows: From Salisbury street to Salisbury pond, block paving shall be laid between the rails, between the tracks and outside thereof to the lines of the curbstones. From Salisbury pond, on its southerly side to the end of this location, block paving shall be laid between the rails and tracks and outside thereof for the space of 18 inches, and for the remaining width of the streets to the lines of the curbstones, macadam pavement shall be laid by the highway department of said city and the expense thereof shall be paid by said

company. The quality of the blocks and the manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks and if said company shall fail to keep said pavement in a safe and proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

That said location was duly accepted in writing by the defendant by acceptance filed with the city clerk of the city of Worces-
29–72 ter and thereafter, and within the time, and as required by law, the defendant constructed its tracks as authorized by said location and began operating its cars over them, and paved said Grove street, as required by the condition of said location.

That by reason of the settling of the rails, sleepers, cross-bars and other track constructions and of the settling and wearing away of the filling in and around the same and by reason of the ordinary, common and customary use of said street the pavement upon said Grove street became worn out, uneven, rough, unfit for further use and dangerous to travel; said defendant was repeatedly requested by the street department of the city of Worcester to repair and maintain said pavements in compliance with the condition of its location above set forth; but said defendant neglected and refused to make said repairs and maintain said pavement and to comply with said condition of its said location; by reason whereof the City of Worcester was obliged to repair and maintain said pavement and has repaired and maintained the same and expended on account thereof the sum of eight and 94/100 dollars, as set forth in the account hereto annexed, marked "G."

The plaintiff has demanded payment of the defendant of said sum and payment has been refused, and the plaintiff says the defendant owes it said sum, with interest thereon from September 3, 1900, the date of said demand.

73 This action was entered at the March return day, 1901, when the parties appeared, and on the twenty-sixth day of April, 1901, the plaintiff filed its declaration, the defendant consenting thereto, and on the fourteenth day of June, 1901, the defendant filed its demurrer, by consent of plaintiff, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } *ss:*

Superior Court.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY CO. } No. —.

*Defendant's Demurrer.*

And now comes the Worcester Consolidated Street Railway Company and demurs to the declaration of the City of Worcester, and to each count thereof, and says that the said declaration and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law for the plaintiff to maintain its action, and assigns the following causes for its demurrer.

1. For that it nowhere appears in said declaration that said action is brought or has been authorized by the city government or other constituted and proper authorities of said plaintiff.

74 2. For that the City of Worcester as a municipal corporation has no interest in the subject matter of said declaration, and has no power or control over this defendant, and that this defendant does not owe any duty and is under no obligations imposed by law to the plaintiff.

3. For that the board of mayor and aldermen of said city of Worcester were not authorized by law to impose conditions upon this defendant in the location of its tracks upon the streets described in the grants of location referred to in the plaintiff's declaration, and that said board was only authorized to impose such restrictions as they deemed the interests of the public might require.

4. For that said board of mayor and aldermen exceeded their authority in attempting to impose and had no authority to impose under the laws in force at the dates of granting said locations and extensions of location of the defendant's tracks the condition that the defendant should lay block paving in any portion of any street occupied by its tracks under said orders of location and extension of location.

5. For that said board of mayor and aldermen had no authority to impose under the laws in force at the date of granting said

75 locations and extensions of location of the defendant's tracks the restriction that the defendant should maintain block paving or any other form of paving or surface material in any portions of such of said streets as were paved, excepting the portions of said streets occupied by the defendant's tracks; nor in the case of such streets as were unpaved any portions thereof except

those occupied by the defendant's tracks and eighteen inches on each side of the portion occupied by the defendant's tracks.

6. For that by the general laws now in force this defendant is not required to keep any portion of the surface material of streets, roads and bridges in repair.

7. For that it is the duty of the City of Worcester and the proper officers of said city to keep in repair, at the expense of said city, highways, townways, streets, causeways and bridges, so that the same may be reasonably safe and convenient for travellers at all seasons of the year.

8. For that the great and general court from which this defendant derived its charter and all its corporate powers has by statute relieved this defendant of any duty to keep in repair any portions of streets which it was formerly by law required to keep in repair,

76 and has substituted for such duty a commutation tax, or excise tax, a portion of which is payable to said City of Worcester, and if said portion of said excise tax so payable to the City of Worcester is not sufficient to yield to said city an amount equal to the cost to said city of the work done by it, which it was not by law previously required to do, has provided a method for increasing the amount of such tax payable to said city.

9. For that it nowhere appears in said declaration that this defendant has not duly and punctually paid said excise tax in the manner provided by law.

10. For that it nowhere appears in said declaration that the portion of said excise tax above referred to has not been sufficient to yield to said defendant the cost of all work done by it which prior to the passage of chapter 578 of the Acts of the Year 1898 said city was not required by law to do.

11. For that the plaintiff, The City of Worcester, has not set out in said declaration any facts which entitled it to judgment.

By its attorneys, WARREN & GARFIELD.

Filed by c. June 14, 1901.

77 And on said fourteenth day of June, 1901, the said demurrer was sustained and judgment ordered for the defendant, from which judgment the plaintiff appealed to the next sitting of the supreme judicial court, holden for said county, and thence the case was continued,—and on the seventeenth day of July, 1902, it was ordered by said supreme judicial court, by its rescript, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, July 14, 1902.

In the case of—

CITY OF WORCESTER
vs.
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Pending in the superior court for the county of Worcester.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:—
Order sustaining demurrer affirmed.
Order *for* entering judgment for defendant affirmed.
By the court,

HENRY A. CLAPP, *Clerk.*

J. M. B.

July 14, 1902.

It is therefore considered by said superior court, to wit,—on the fourth day of August, 1902, that the said Worcester Consolidated Street Railway Company recover against the City of Worcester its costs of suit taxed at forty-nine dollars and twenty-seven cents.

78 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Seal of the Superior Court.

Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this twelfth day of November, in the year of our Lord nineteen hundred and three.

T. S. JOHNSON, *Clerk.*

79 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

CITY OF WORCESTER
*v.*
WORCESTER CONSOLIDATED STREET RAILWAY CO.

*Petition for Writ of Error and Assignment of Errors.*

The City of Worcester, plaintiff in the above-entitled action, represents that errors of law appear in the record in this case:

That the board of aldermen of the city of Worcester, acting under section twenty-one of chapter one hundred thirteen of the Public Statutes of Massachusetts, authorized the defendant street railway company to extend the location of its tracks within the city of Worcester—

Beginning at the end of the present double track in Pleasant street at West street, thence westerly along said Pleasant street to the easterly line of Park avenue in said Worcester, on the 24th day of April, 1893, and beginning at a point in Trumbull street at its intersection with the northerly line of Park street, thence crossing Trumbull square and continuing southerly on Green street to Millbury street, thence southerly on Millbury street to the terminus of the present track at Greenwood street in said Worcester, on the tenth day of April, 1893, and from its present tracks in Front street at Washington square through and over Washington square to Shrewsbury street, through and over Shrewsbury street to Belmont street and through and over Belmont street to a point opposite the center of Lake avenue, in the city of Worcester, on the
80 eleventh day of May, 1893, and from said company's tracks in Front street easterly across Washington square to Shrewsbury street, thence easterly along Shrewsbury street to Belmont street, thence easterly on Belmont street to Plantation street on the twenty-fourth day of April, 1893, and beginning at the tracks in Salisbury, thence northerly along Grove street to Park avenue, thence northerly along Park avenue to the end of the present track at Chadwick square in the city of Worcester, on the eighth of May, 1893;—and that all said several locations and extensions were granted under certain restrictions and conditions set out at length in the record in said cause;

That all the Federal questions hereinafter set forth in the assignment of errors were duly raised in the trial court and were duly carried to the highest court of the Commonwealth of Massachusetts, to wit, the supreme judicial court for the Commonwealth, and there decided adversely to the plaintiff's contention and adversely to the existence of the Federal rights claimed.

Wherefore, it respectfully petitions for a writ of error to the superior court of the Commonwealth of Massachusetts sitting at Worcester within and for the county of Worcester, and files herewith its assignment of errors, as follows, to wit:

1. The court erred in deciding that the effect of chapter 578 of the Laws of 1898 was to free it from all obligation thereof to keep in repair any portion of the surface materials of streets, in which its tracks were laid, unless the obligations so to do had been imposed in a grant of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that they are of such a nature that the legislature can modify or annul them
81 without thereby violating the constitutional provisions.

3. The court erred in deciding that it was within the con-

stitutional power of the legislature to free the defendant from the obligations imposed upon it by the locations in question.

4. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under sub-division one, of section ten of article 1, of the Constitution of the United States, as being an impairment of the obligations of contracts.

5. The court erred in deciding that the provisions of chapter 578 of the Laws of 1898, relieving the defendant from all obligation thereof to keep any portion of the surface material of the streets in which its tracks were laid, as it was required to do under the provisions of the locations in question, were not unconstitutional under article ten of the declaration of rights of the constitution of Massachusetts, and under the fourteenth amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

THE CITY OF WORCESTER,
By ARTHUR P. RUGG,
*City Solicitor and Attorney for Plaintiff.*

[Endorsed:] City of Worcester *vs.* Worcester Consolidated Street Railway Co. Petition for writ of error Assignment of errors. Filed Sept. 30th 1903 Attest T. S. Johnson clerk.

82 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *October* 31*st*, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the cases of

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

SAME
*vs.*
SAME.

In Supreme Judicial Court. Petitions for Writs of Mandamus.

SAME
*vs.*
SAME.

In Superior Court. Action of Contract.

CITY OF WORCESTER & BOARD OF ALDERMEN OF THE CITY OF Worcester
*vs.*
SAME.

SAME
*vs.*
SAME.

In Superior Court. Bills in Equity.

Decided on the 14th day of July, 1903.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

83 BARKER, *J.*:

One of these cases is an action of contract brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The other two cases are bills in equity asking for similar relief.

The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered

for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for the determination of the full court, with an agreement of the parties that no question of
84 the form of procedure or of the proper parties should be insisted upon.

The question in all the cases is whether the railway company since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets and are not the proprietors of the right to use them for travel. Unless otherwise provided each municipality at its own expense must keep the highways, town ways, causeways and bridges within it in repair. Under the power to make by-laws and ordinances a town or city may to some extent regulate the use of streets by travellers.

The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged by the terms of its charter or by general law to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters. St. 1864, c. 229, § 18. St. 1871, c. 381, § 21. St. 1881, c. 121, § 1. Pub. Sts. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations,
85 have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14. St. 1871, c. 381, § 14. St. 1874, c. 29, § 6. Pub. Sts. c. 113, §§ 7, 21.

Before the year 1898 very many street railways had been built not only in the more densely populated places but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants were accepted and acted upon by the companies.

The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recom-
86 mendation that authority should be granted to require "that a direct return should be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using

the streets or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility or the lure of a higher bid from would-be competitors."

Upon this the legislature by St. 1897, c. 509, provided for the creation of a commission "to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this Commonwealth and in other States and countries, and the need, if any, of legislation in this Commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of taxing the same."

The report to the legislature of 1898 was accompanied by the draft of a bill which with a few, but some important, amendments became the St. 1898, c. 578. See Leg. Doc. 1898, House, No. 475.

The report made it clear that very many different obligations which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among
which had been that of paving and keeping in repair more
87 of the street than was required by the general law, and also
that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies.

The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations."

The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in
the city or town as to whose streets, roads or bridges there
88 might be a question. St. 1898, c. 578, § 1. Springfield *v.*
Springfield Street Railway, *ante*, 41. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in Springfield *v.* Springfield Street Railway, *ante*, 41.

Whether the obligations sought to be enforced originally were

valid as "restrictions" within the meaning of the statutes in force when the grants of locations were made is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law the order of the superior court sustaining the demurrer is affirmed and also the order for entering judgment for the defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed.

*So ordered.*

88½ [Endorsed:] Worcester *vs.* Worcester, &c., Co. Certified copy of the opinion of the supreme judicial court.

89 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Worcester Consolidated Street Railway Company, a corporation duly organized by law and having a usual place of business in the city and county of Worcester and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington on the * 16th day of November next, pursuant to a writ of error filed in the clerk's office of the † superior court of the Commonwealth of Massachusetts in the county of Worcester wherein The City of Worcester is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of Massachusetts, this 17th day of October, in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

ALBERT MASON, *C. J. S. C.*

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* Not exceeding 30 days from the day of signing.

† Name of court to which writ of error is directed.

Nov. 7, 1903.

I hereby acknowledge and accept service of the within citation.

F. H. DEWEY,

*Attorney for the Worcester Consolidated Street Railway Co.*

90 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of—

I. The record of the case of The City of Worcester *vs.* The Worcester Consolidated Street Railway Company, in an action of contract, entered in said superior court, determined and annexed to and transmitted with said record, of—

II. The application for writ of error and assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with—

IV. The original citation and acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court, this twelfth day of November, in the year of our Lord, one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

91 UNITED STATES OF AMERICA:

Supreme Court of the United States.

CITY OF WORCESTER
*vs.*
WORCESTER CONSOLIDATED STREET RAILWAY COMPANY. } # 490.

It is agreed that in the above entitled cause the tables contained in the record may be omitted in the printing.

GEO. F. HOAR,
ARTHUR P. RUGG,
*City Solicitor and Attorney for Plaintiff.*
F. H. DEWEY,
*President of and Attorney for Defendant.*

92 [Endorsed:] File No. 19141. Supreme Court U. S. October term, 1903. Term No. 490. The City of Worcester *et al.* pl'ff in error *vs.* The Worcester Consolidated Street Ry. Company. Stipulation to omit part of record in printing. Filed Dec. 16, 1903.

[Endorsed:] # 1450. (Action at law.) The City of Worcester *vs.* The Worcester Consolidated Street Railway Company.

Endorsed on cover: File No. 19,141. Massachusetts superior court. Term No. 490. The City of Worcester and The Board of Aldermen of the City of Worcester, plaintiffs in error, *vs.* The Worcester Consolidated Street Railway Company. Filed November 23rd, 1903. File No. 19,141.